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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of Southwestern Bell
Telephone Company, Pacific Bell, and
Nevada Bell Petition for Relief from
Regulation Pursuant to Section 706 of
the Telecommunications Act of 1996
and 47 U.S.C. Section 160 for ADSL
Infrastructure and Service.

CC Docket 98-91

**REPLY COMMENTS OF THE PEOPLE OF THE STATE
OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA ON THE PETITION OF SOUTHWEST
BELL, PACIFIC BELL, AND NEVADA BELL FOR RELIEF FROM
REGULATION**

I. INTRODUCTION

On June 11, 1998, the Federal Communications Commission ("Commission" or "FCC") released Public Notice (DA 98-1111) establishing a comment cycle for comments on SBC's Petition for Relief From Regulation Pursuant to Section 706 of the Telecommunications Act and 47 U.S.C. Section 160 for ADSL Infrastructure and Service. Comments were filed on June 24, 1998, and replies are due no later than July 1, 1998. Accordingly, the California Public Utilities Commission ("CPUC") submits these Reply Comments.

The Petition asked the FCC to forbear from regulating Asymmetrical Digital Subscriber Line (ADSL) services. In support of its request, SBC asserts

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that Section 706 and Section 10 each provide separate and independent forbearance authority. SBC further claims that Section 706 confers the FCC with substantive forbearance authority that is not subject to Section 10's limitations and restrictions which prohibit forbearance from Sections 251(c) and 271 until those provisions are fully implemented. The Petition urges the FCC to conclude that Section 706 acts as an independent grant of authority through which SBC can seek relief from unbundling obligations under Section 251 (c)(3), from wholesale discounts under 251(c)(4), from dominant treatment that would in turn eliminate tariffing requirements of 47 U.S.C. Section 203, and applicable rules in 47 C.F.R. Parts 61 and 69, and from most favored nation obligations of 47 U.S.C. Section 252(i) to the extent that it conflicts with the relief requested in the Petition. (Petition, pp. 5-6)

SBC's Petition received support from incumbent LECs (ILECs) such as BellSouth and GTE. The United States Telephone Association (USTA) and the Campaign for Telecommunications Access also favored the Petition. The general themes underlying support are: 1) the removal of regulatory barriers is necessary because those barriers impede the development of innovative technologies; 2) market forces, not regulation, will provide the incentives for infrastructure investment; and 3) SBC has presented a compelling showing for regulatory relief pursuant to Section 10, without the necessity of resolving the Section 706 issue. (BellSouth, pp. 2-3, 5, USTA, p. 3, GTE, pp. 7-8, 3)

However, the majority of the comments reviewed by the CPUC were opposed to SBC's Petition. Those parties include Interexchange Carriers (IECs) such as AT&T and Teleport Communications Group (TCG), LCI, MCI, Sprint, and WorldCom, Inc., as well as Competitive LECs (CLECs) such as Covad, Competitive Telecommunications Association (CompTel), DSL Access Telecommunications Alliance (DATA), and Hyperion. Internet Service Providers also weighed in, primarily in opposition. Collectively, the grounds for opposition include the following: 1) the SBC Petition would give it a virtual *carte blanche* to avoid its section 251 obligations (CompTel, p. 8); 2) ADSL competitors rely heavily, if not totally, on ILEC local loops to provide their services (AT&T, pp. 4-5, LCI, p. 3, MCI, pp. 6-8; WorldCom, p. 12, 13); 3) SBC's track record in making UNEs and collocation available to CLECs is so poor that it is inconceivable the CLECs would ever be able to obtain the network elements and interconnection opportunities from SBC that are necessary to provide competitive broadband services if SBC's request is approved (AT&T, pp. 6-10, MCI, pp. 9-10).

The state of California is in a different position than the ILECs, CLECs, ISPs, or other carriers. Our concern is rooted in possible infringements on state jurisdiction that could result if the Petition were granted, including the state's ability to ensure that non-discriminatory access to the local loop is not impaired, or the state's ability to determine compensation for terminating the intrastate portion of ISP calls. Hence, the CPUC believes that the relief requested in the Petition

impinges on state jurisdiction and is premature. We concur with those parties who suggest that the FCC defer action on the Petition until the complex issues presented in the Petition can be thoroughly examined in the upcoming FCC proceeding on advanced telecommunications. Therefore, the CPUC recommends that the issues posed by the Petition be taken up in the statutorily-mandated Section 706 inquiry.

II. DISCUSSION

A. State Jurisdiction Would Be Infringed If the FCC Grants the Petition.

One of the CPUC's concerns is that SBC's Petition could hamper competition in the local exchange and high-bandwidth markets. For example, by seeking deregulation for a service that employs significant portions of the local-exchange and inter-office networks, SBC could attain pricing freedom that it might use to undermine the entry of competitors like cable providers by pricing ADSL below what it costs SBC to obtain loops and interoffice transport. State regulation is important in preventing these kinds of practices.

Furthermore, the local telephone calls that provide access to ISPs are transmitted over local telephone lines, and are thus subject to state regulation. In the Petition, SBC stated its intention to file interstate tariffs to offer ADSL service, "[i]nasmuch as Internet traffic is predominantly interstate in nature." (Petition, p. 22) SBC also contended in a federal district court case that connections to ISPs are

interstate calls, falling under the FCC's jurisdiction. The federal court found otherwise in its ruling against SBC.¹ Reciprocal compensation was an issue in that proceeding, as it is in this Petition. The court resolved the issue by requiring SBC to compensate Time Warner for local calls connecting SBC customers to ISPs. The CPUC's consideration of similar issues is pending in complaint and rulemaking proceedings. If SBC's Petition were granted, it could foreclose one potential outcome of those proceedings.

In addition, the CPUC believes that the states have a significant role to play in the deployment of advanced telecommunications, especially in the local market. The Petition states that "the SBC LECs believe that section 706 is an independent grant of authority that requires the FCC to act to provide investment incentives for the deployment of advanced telecommunications capability." (Petition, p. 4,)² The plain reading of Section 706(a) indicates that the states also have the authority and, indeed, the obligation to encourage the deployment of advanced telecommunications:

“(a) IN GENERAL - The Commission *and each State commission* with regulatory jurisdiction over telecommunications services shall encourage the

¹ In *SBC v. Public Utility Commission of Texas*, the court recently held that calls to ISPs should be considered local calls and ordered SBC to pay reciprocal compensation to the CLECs that serve ISPs.

² The Petition, on pages 22-24, asserts that two separate and independent statutes, Section 706 and Section 10 (47 USC 160), may provide forbearance relief. However, with Section 10, forbearance from Sections 251(c) or 271 is prohibited until those provisions are fully implemented. The Petition notes that the conclusion that section 706 acts as an independent authority not subject to Section 10 limitations has been challenged by competitors of carriers subject to sections 251(c) and 271, and the matter is still pending. The Petition therefore urges the FCC to conclude that Section 706 acts as an independent grant of authority.

deployment *on a reasonable and timely basis* of advanced telecommunications capability to all Americans...by *utilizing*, in a manner consistent with the public interest,...measures that promote *competition in the local telecommunications market*, or other regulating methods that remove barriers to infrastructure investment.” (Emphasis added.)

This provision supports the CPUC's view that states, in the exercise of their jurisdiction, have an essential role to play in encouraging the deployment of advanced telecommunications. The provision also fails to support SBC's contention that Section 706 ought to be read independently of Section 10. Section 706 refers directly to regulatory forbearance, the subject of Section 10, as one of the tools available to the Commission to promote competition. The 1996 Act created both sections concurrently and there is no reason to believe that Congress intended them not to be read together as SBC asserts. The link is more firmly established by the direct reference to regulatory forbearance in Section 706.

Achieving competition in the local market for advanced telecommunications is of utmost concern to the CPUC. Ensuring that competitors have equal access to ADSL compatible loops is a legitimate state concern since this is a necessary condition for entrants to provide ADSL services competitive with SBCs. As SBC recognizes in its Petition, effective competition to provide ADSL services will depend on access to collocation space and functioning, non-

discriminatory spectrum management.³ California believes it would be premature to grant the Petition until these conditions are met. In its Petition, SBC asserts that it is committed to providing collocation, but fails to mention that in five offices where it plans to offer ADSL, no more space is available for competitors to collocate equipment. SBC has not justified that determination, and has not satisfied the standards of impracticality for technical reasons or space limitations, as required by Section 251(c)(6), in order to provide virtual collocation.

In addition, SBC asks that its contemplated future actions with respect to spectrum management be used to demonstrate its "solid commitment to non-discriminatory treatment." In its Petition, SBC admits that its automated spectrum management process will not be in place until mid-1999, this automated process is intended to improve on known defects in the current manual system. The Commission is being asked to affirm now, that a process that will not be operational until mid 1999 will be administered in a non-discriminatory manner.

**B. The FCC Should Defer Action on SBC's Petition
Until the FCC's Section 706 Proceeding is Under Way.**

The CPUC concurs with the New York Commission and others who commented that action should be deferred on the Petition until the FCC establishes a proceeding to resolve the very important issues presented in the Petition. To the extent that the Petition pre-dates the FCC's proceeding, it is premature. The 1996

³ Currently, spectrum management is a manual process that identifies other digital services that cause interference.

Act mandates that the FCC initiate, within 30 months after the Act's enactment, a Notice of Inquiry (NOI) regarding the availability of advanced telecommunications capability.⁴ That deadline is fast approaching, as the inquiry must be initiated by August 1998. The same provision requires the NOI to be completed within 180 days after its initiation. We believe the preferred approach would be to consolidate SBC's Petition with the 706 proceeding.

Although the CPUC sees a need to further explore the complex issues in the Petition, we would not wish to delay customer availability of these services and technology until the FCC has completed its Section 706 rulemaking. Both the FCC and the states are instructed to encourage advanced telecommunications on a reasonable and timely basis.

III. CONCLUSION

To the extent that the relief sought by SBC's Petition impinges on state jurisdiction, the CPUC opposes the Petition. The granting of the Petition could effectively hamper state enforcement and interfere with jurisdiction over matters that fall legitimately and properly under the state's umbrella. Not to be overlooked is the diminution of state authority if the Commission were to forbear under Section 10, as the state would be precluded from enforcing the requirements of Sections 251 and 271. We believe Congress intended *both* state and federal involvement in order to make competition at the local and national level a reality.

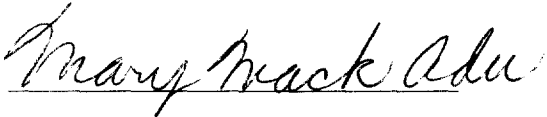
⁴ See Section 706(b).

Moreover, it would not be in the public interest, if, in the alleged interest of advancing telecommunications, the CPUC ceded its authority or shirked its responsibility to collaborate with the Commission in tackling these complex and far-reaching issues. Therefore, we respectfully ask that the Commission not grant the Petition and instead to take up the matter in its Section 706 Proceeding.

July 9, 1998

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mary Mack Adu, hereby certify that on this 9th day of July, 1998, a true and correct copy of the foregoing document entitled, "REPLY COMMENTS OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA ON THE PETITION OF SOUTHWEST BELL, PACIFIC BELL, AND NEVADA BELL FOR RELIEF FROM REGULATION" was mailed first class, postage prepaid to all known parties of record.



MARY MACK ADU